

OEA/Ser.L/V/II.
Doc. 176
13 August 2021
Original: Spanish

REPORT No. 168/21
PETITION 906-16
REPORT ON ADMISSIBILITY

FÁBIO DE JESÚS RIBEIRO
BRAZIL

Approved electronically by the Commission on August 13 , 2021

Cite as: IACHR, Report No168/21. Petition 906-16. Admissibility. Fábio de Jesús Ribeiro. Brazil.
August 13, 2021.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Manuela Menezes Silva
Presunta víctima	Fábio de Jesús Ribeiro
State denounced:	Brazil ¹
Rights invoked:	Articles 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 11 (privacy), 17 (rights of the family), 24 (equal protection) and 25 (judicial protection) of the American Convention on Human Rights ²

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition:	May 12, 2016
Additional information received at the stage of initial review:	May 17, 2016, June 28, 2016, December 7, 2016, January 17, 2017, January 24, 2017, January 31, 2017, February 6, 2017, March 6, 2017, March 10, 2017, March 13, 2017, April 7, 2017, April 11, 2017, April 17, 2017, May 5, 2017, May 8, 2017, May 16, 2017, May 22, 2017, May 23, 2017, May 30, 2017 and October 17, 2017
Notification of the petition to the State:	October 23, 2019
State's first response:	January 24, 2020
Additional observations from the petitioner:	March 19, 2021
Additional observations from the State:	May 25, 2021

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention (instrument of ratification deposited on September 25, 1992)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and international <i>res judicata</i>:	No
Rights declared admissible:	Article 5 (humane treatment), 8 (fair trial), 11 (privacy), 24 (equal protection), and 25 (judicial protection) of the American Convention, in connection with articles 1.1 (duty to respect rights) and 2 (domestic legal effects) thereof
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, under section VI
Timeliness of the petition:	Yes, under section VI

¹ Pursuant to the provisions of Article 17.2.a of the Commission's Rules of Procedure, Commissioner Flávia Piovesan, a Brazilian national, did not take part in the discussion or the decision-making in this matter.

² Hereinafter, "the Convention" or "the American Convention."

³ The observations of each party were duly forwarded to the opposing party.

V. ALLEGED FACTS

1. It is the contention of the petitioner that the State violated the alleged victim's rights in failing to punish a councilman of the city of Feira de Santana, who is shielded by immunity while serving in office, for statements he made based on prejudice against LGBTI persons.

2. The petitioner recounts that on May 16, 2016, Fabio de Jesús Ribero, filed a complaint with the Committee on Sexual Diversity and Combatting Homophobia of the Brazilian Bar Association of Bahia, on behalf of the organizations "Grupo de Liberdade Igualdade e Cidadania Homossexual" and "Articulação da Parada Gay de Feira de Santana" for repeated statements considered to be "LGBTphobic" by the petitioner, which were made by then councilman of the city of Feira de Santana Edivaldo Lima, in performance of his public duties⁴. In his complaint, the alleged victim specified that this public official called LGBTI persons in some of his statements "children of the devil" and "aberrations," among other degrading remarks; and he alleged that these statements infringed Article 5 of the Federal Constitution of Brazil, which enshrines the right to equality under the law.

3. The petitioner contends that the aforementioned councilman's conduct is not just an isolated incident and that a number of news reports and investigative reporting articles bear out that such statements are a recurring practice of some members of the municipal legislative body. In this same vein, he also claims that even though Brazil is a secular State, there is a powerful religious bloc within the governing party's caucus which, in some instances, uses hate speech, incites violence and encourages segregation against LGBTI persons, instigating the humiliation and ridicule of this group of people.

4. He argues that domestic legislation does not recognize acts of discrimination against the LGBTI population as crimes and the members of the council have not taken any steps to regulate such conduct. Further aggravating this situation, he emphasizes, is the fact that council members have immunity and cannot be held accountable for any their opinions, words or votes issued in the performance of their mandate, pursuant to Article 29, subsection XVIII of the 1988 Federal Constitution of Brazil. Consequently, he claims that even if legislation were approved to punish discriminatory speech against LGBTI persons, these public officials could not be sanctioned because of this protection under the law. Thus, it is the contention of the petitioner that these officials are taking advantage of their immunity to commit discriminatory acts.

5. Based on the foregoing, the petitioner contends that the State violated the right of the alleged victim when it allowed the statements at issue made by the councilman of the city of Feira de Santana to go unpunished. He argues that Mr. Jesús Ribero and his family are constantly enduring discrimination as a result of these statements and, furthermore, are unable to take any action against the "LGBTphobia" mongers. The petitioner, however, does not provide further details to support this last contention.

6. In relation to exhaustion of domestic remedies, they argue that the exception provided for in Article 46.2.a) of the American Convention is applicable, inasmuch as no specific provision of domestic legislation exists in Brazil to sanction homophobic or transphobic conduct. He claims that, in accordance with Article 5 of the Brazilian Constitution, no conduct that has not been previously established by law can be penalized⁵ and, therefore, no legal action can be brought for the statements made by the former councilman of the city of Feira de Santana. He further claims that the legal precedents of the Federal Supreme Court with regard to immunity uphold the preclusion of bringing any civil or criminal case against this public official.

7. Lastly, he claims that even though, according to the arguments submitted by the State, the Federal Supreme Court has recently allowed homophobia and transphobia to be punished under Law Number

⁴ As an example, the petitioner attaches the following press releases: <http://www.tribunafeirense.com.br/noticias/15140/vereador-e-contra-atendimento-a-travestis-e-transsexuais-em-centro-de-referencia-da-mulher.html>; y <https://www.blogdovelame.com/tag/feira-de-santana/>

⁵ 1988 Federal Constitution of Brazil. "Article 5. Everyone is equal under the law, without any distinction, guaranteeing Brazilians and foreign residents in the Country the inviolability of the rights to life, liberty, equality, security and to priority as follows: [...] XXXIX. There are no criminal offenses without prior definition by law; [...]".

7716/89, which makes the practice of discrimination or racial prejudice a crime,⁶ the government has filed several appeals with the courts to call that ruling into question. Based on the information provided, that law punishes crimes resulting from discrimination or prejudice based on race, color, ethnic background, religion or national origin. In this regard, the provision establishes both the practices that are to be punished, and the appropriate punishment for each act. Additionally, he argues that, even though public policies have been adopted on behalf of the LGBTI community, these decisions are only administrative acts that are not generally binding on all public officials.

8. In response, the State contends that the alleged facts do not constitute human rights violations that are attributable to it. It claims that in the domestic sphere, different instruments and decisions ensure the right to freedom of sexual orientation. Specifically, it noted that the Federal Supreme Court has set a legal precedent recognizing this right and that, in the public policy arena, the “Pact against LGTBphobic Violence,” which was introduced by the federal government, seeks to combat violence against the LGBTI community.

9. In 2019, through judgment on direct action of unconstitutionality for omission Number 26 (hereinafter ADO 26), the Federal Supreme Court ruled that the absence of a criminal law providing for the punishment of homophobic and transphobic acts was unconstitutional, on the grounds that it did not provide for the effective protection set forth in Article 5, subsection 41 of the Political Constitution.⁷ Based on the foregoing, the aforementioned court ordered that until such time as the National Congress enacted new legislation, the conduct in reference will be understood as racist practice and, consequently, shall be covered under the statutory description of criminal offense provided for by Law No. 7.716/89, which defines the practice of discrimination or racial prejudice as a crime. In this vein, grounds of the foregoing ruling were that *“homotransphobic practices are deemed to be species of the gender racism, in the dimension of social racism [...] inasmuch as the result of such conduct is acts of segregation, which is degrading to the members of the LGBT group, based on their sexual orientation or their gender identity [...]”*⁸ It specifies that this decision is binding and has legal effect in general and, therefore, since the time it [the decision] was adopted, the arguments of petitioner have become baseless, because acts of discrimination against the LGBTI community committed after the publication of the above-mentioned ruling, are to be prosecuted as crimes resulting from racial discrimination.

10. The State further contends that, contrary to the claims of the petitioner, the motions filed by the government with respect to ADO 26 only seek clarification of the scope and content thereof. Specifically, it argues that one of the motions is intended to learn the method of interpretation used to settle the issue that was raised; while the other motion is only aimed at obtaining a detailed explanation of the scope of Law Number 7716/89, in order to not improperly punish some acts of expression of thought and artistic and scientific freedom and freedom of professional practice.

11. Additionally, Brazil contends in general that Constitutions of democratic countries usually lay out explicit rules for parliamentary immunity, not as a privilege granted to someone who holds a parliamentary position, but as an inherent guarantee of the exercise of the functions of the Legislative Branch. In this regard, it notes that the Federal Supreme Court has written that *“even though they may be undesirable, personal offenses issued in the ambit of political discussion, that respect the limits laid out by the Constitution itself, are not subject to judicial reprimand. Immunity that is characterized as additional protection to freedom of expression, for the purpose of ensuring the fluidity of the public debate and, ultimately, democracy itself.”* Based on the foregoing, it claims a member of parliament or councilman cannot be prosecuted for his or her opinions, words or votes, even when such expression is contrary to the way of thinking of citizens in general.

⁶ According to the information provided, this law punishes crimes resulting from discrimination or prejudice based on race, color, ethnic background, religion or national origin. In this regard, this legal provision establishes both the practices that will be punished, and the appropriate punishment for each act.

⁷ 1988 Federal Constitution of Brazil. “Article 5. Everyone is equal under the law, without distinction of any nature, being guaranteed for Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, security, and to priority as follows: (...) XLI. the practice of racism constitutes a crime that does not allow bail and is not time-barred by statute of limitations, subject to imprisonment as provided by law; (...)”

⁸ Judgment available at: <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADO26votoMAM.pdf>

12. The State alleges that even though the statement made by the city councilman in question may be contrary to the way of thinking of other members of the council or of the citizens themselves, the statements in question are protected by the immunity, in keeping with the right to freedom of expression, pursuant to the legal precedent cited above.

13. In this same vein, it notes that while controversial statements cannot be restricted by the judiciary, they are subject to examination by the Legislative Branch. It points out that, in the instant case, the Municipal Council of Feira Santana examined the situation at issue, based on a request by the Brazilian Bar Association of Bahia, and decided to archive it, on the grounds of parliamentary immunity.

14. Consequently, based on the foregoing reasons, Brazil requests that the instant petition be declared inadmissible, on the grounds that it does not fulfill the requirement of a colorable claim of a human rights violation, as established in Article 47.b of the American Convention.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

15. The IACHR notes that the object of the petition is to call into question the lack of a provision of law, particularly of a criminal nature, to provide for the punishment of statements made by the councilman of the city of Feira de Santana as crimes based on prejudice against LGBTI persons. In light of the non-existence of such a remedy, the Brazilian Bar Association of Bahia brought a complaint with the Municipal Council of Feira de Santana, but this body archived the case, citing as its only grounds the principle of parliamentary immunity. As a result of these events, the petitioner requested that the exception set forth in Article 46.2.a) of the American Convention be applied. The State, nonetheless, has not disputed exhaustion of domestic remedies, nor has it made any reference to the timeliness of the filing of the petition, and has only responded that the facts of the petition do not tend to establish human rights violations.

16. The IACHR notes that, based on the information provided by the parties, the statements made by the councilman of the city of Feira de Santana can be described at least as statements that denigrate and discriminate against the alleged victim. Notwithstanding, the IACHR notes that at the time the events took place, no provision was in effect under domestic law to enable Mr. Fabio de Jesús Ribero to be provided any means of reparation, either through a civil remedy or a correction of the record or retraction, nor was any specific administrative provision in effect to enable the Municipal Council of Feira de Santana to impose punishment for the aforementioned statements. On the contrary, as noted in the previous paragraph, the State confined its response to the specific contention that the facts of the petition do not amount to human rights violations and that, consequently, the above-cited legislative body decided to archive any action against the councilman in question.

17. In view of these considerations and taking into account that the petitioner pursued the only procedure available to him in order to assert his rights, the IACHR finds that it does not have any information to suggest that any judicial remedy was available under the law to protect the rights of persons who have been affected by statements such as those cited in the petition of the instant case, made by public officials who are shielded by parliamentary immunity. The State, in turn, did not provide any rebuttal, albeit it had the opportunity to do so during the proceedings.

18. Therefore, the IACHR concludes that in the instant case the exception is applicable, as set forth in Article 46.2.a) of the American Convention, specifically referring to domestic legislation not affording due process of law for the protection of the right or rights that have allegedly been violated. Additionally, the Commission notes that the acts in the petition allegedly began to take place in 2016, in that year the petition was lodged with the IACHR, and the effects of the acts would have extended into the present time. Consequently, the Commission finds that the petition has been lodged within a reasonable time as provided for under Article 32.2 of the IACHR's Rules of Procedure.

VII. ANALYSIS OF COLORABLE CLAIM

19. Although in principle all forms of speech are protected by the right to freedom of expression, the IACHR recalls that the right to freedom of expression is not an absolute right and is subject to limitations, specifically those established in Articles 13.2 and 13.5 of the American Convention, governed by several standards. As for Article 13.5, the Commission has held that States are required to adopt legislation to punish advocacy of hatred that constitutes “incitements to lawless violence or to any other similar action.”⁹ In contrast, as per Article 13.2 of the American Convention, other intolerant expressions or comments that openly denigrate, stigmatize or discriminate against a person or a group of persons on the grounds of perceived or actual sexual orientation or gender identity, but that do not reach the threshold of advocacy of hatred that incites lawless violence, may be subject to the imposition of subsequent sanctions of a civil or administrative nature, or to remedies such as the right to correction and reply, in order to ensure the rights to dignity and non-discrimination of a particular group of society, including LGBTI persons,¹⁰ in strict adherence to the requirements of legality, necessity and proportionality. Additionally, in principle, when a public official makes stigmatizing statements about a particular group of persons, their right to freedom of expression can be infringed, given the chilling effect that such speech can have.

20. Based on the foregoing, in the view of the IACHR, when a public official makes public statements that stigmatize or discriminate against persons because of their sexual orientation, gender identity or expression in terms of form, content and scope, among other criteria, measures must be taken which, in keeping with the principles of legality, necessity and proportionality as established in Article 13.2 of the American Convention, enable the offended parties to bring civil or administrative proceedings, or pursue a remedy for correction of the record and reply, in order to restore their rights. The IACHR reiterates that only in the event of advocacy of hatred that constitutes incitements to lawless violence or other similar actions, as defined and prohibited under Article 13.5 of the American Convention, can measures of a criminal nature be taken, with a high threshold for the imposition of punishment.

21. Moreover, in keeping with the holdings of the European Court of Human Rights, the IACHR has stated that for parliamentary immunity to be consistent with human rights standards, it must i) pursue a legitimate objective (such as, to protect the freedom of expression of a member of parliament in performance of his or her mandate, and ii) be used in a proportionate way.¹¹ It further noted that decisions based on this legal concept must be adequately reasoned, inasmuch as the duty to state grounds is a guarantee associated with the proper administration of justice, which protects citizens’ right to be tried for reasons provided by law, and ascribes credibility to judicial decisions in the sphere of a democratic society.¹² In the case at hand, the IACHR does not have sufficient information, thus far, to enable it to examine the grounds cited by the Municipal Council of Feira de Santana in order to determine whether or not immunity was used as grounds for the decision in accordance with the State’s international obligations.

22. Based on the foregoing considerations and in light of the elements of fact and law set forth by the parties and the nature of the matter before it, the Commission finds that the allegations of the petitioner, pertaining to the lack of any provision of law to provide for establishing at least subsequent liability of someone who has made denigrating and/or discriminatory statements and the improper use of immunity, are not manifestly baseless and require examination on the merits, inasmuch as should they be proven, they could constitute violations of the rights protected under Articles 5 (humane treatment), 8 (fair trial), 11 (privacy), 24 (equal protection) and 25 (judicial protection) of the American Convention, in connection with articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereof, to the detriment of Fábio de Jesús Ribeiro.

⁹ See IACHR, Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, November 12, 2015, paragraphs 235, 237 and 238.

¹⁰ IACHR, Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, November 12, 2015, paragraphs 230 and 232.

¹¹ IACHR, Report No. 10/19, Merits, Márcia Barbosa de Souza and Her Family, Brazil, February 12, 2019, paragraph 57; and Judgment by the European Court of Human Rights (Second Section), Case of A v. United Kingdom, Application N° 35373/97 of 17, December 2002

¹² IACHR, Report No. 10/19, Merits, Márcia Barbosa de Souza and Her Family, Brazil, February 12, 2019, paragraph 59.

23. As for the alleged violations of Articles 7 (personal liberty) and 17 (rights of the family) of the American Convention, the Commission finds that the petitioner has not put forward any argument or basis to enable it to reach a *prima facie* conclusion of a potential violation.

VIII. DECISION

1. To declare admissible the instant petition in relation to Articles 5, 8, 11, 24 and 25 of the American Convention, in connection with Articles 1.1 and 2 thereof; and

2. To declare inadmissible the instant petition in relation to Articles 7 and 17 of the American Convention; and

3. To notify the parties of this decision; proceed to the examination of the merits of the matter; and publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

4. Approved by the Inter-American Commission on Human Rights on the 13th day of the month of August, 2021. (Signed:) Antonia Urrejola, President; Julissa Mantilla Falcón, First Vice President; Margarete May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, Joel Hernández, and Stuardo Ralón Orellana, Commissioners.